National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: April 11, 1996

TO: James S. Scott, Regional Director, Region 32

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: United Association of Journeymen, and Apprentices of the Plumbing, and Pipefitting Industry, Local Union, No. 38, (The Linford Company), Cases 32-CC-1401 and 32-CE-72; Stationary Engineers, Local 39, (Linford Service Company), Case 32-CD-146

These cases were submitted for advice pursuant to GC Memorandum 96-1 in that they involve the application and enforcement of an anti-dual shop clause.

FACTS

The Linford Company (Linford) is a building contractor for HVAC systems in commercial, institutional and industrial facilities. Linford is owned and operated by Robert Linford who is the President and CEO of the company. Linford is a member of the multi-employer bargaining association, Mechanical Contractors Association (MCA), through whom it is currently a party to a collective bargaining agreement with United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 38 (Local 38) extending from July 1, 1990 through June 30, 1996.

Linford Service Company (LSC) is a service and maintenance contractor providing service, maintenance, repair, and replacement of heating and air conditioning equipment in commercial buildings. LSC is owned by Robert Linford, but is managed and operated by Richard Almini who is the president and general manager. Almini handles the labor relations and directly negotiates contracts with Local 39. LSC has a bargaining relationship with Stationary Engineers, Local 39 (Local 39) and has a collective bargaining agreement with Local 39 covering field technicians extending from November 1, 1995 through October 31, 1998.

Linford and LSC operate from different facilities in Oakland and perform different types of work with different employees. There is no evidence or contention that the management and operation of Linford or LSC is intermingled or common. There is no evidence that either company has the ability to control the work of the other. No more that 5-8% of LSC's work has any link with Linford. The Region has concluded that Linford and LSC are neither single employers nor alter egos and does not submit this issue for advice.

On September 26, 1995, a business representative of Local 38 filed a grievance against Linford concerning a jobsite located at a senior citizen apartment house at 390 Clementina Street in San Francisco where LSC is engaged in the repair and replacement of a hot water boiler system. The grievance alleged that several clauses of the contract had been violated, because Linford and LSC had the same listed owner and that work at the jobsite was being given to non-signatory LSC. Contract provision Article 1, Section 2(d) provides:

Where a signatory to an Agreement is also an owner, partner, holds a financial interest in or occupies a managerial or supervisory position in any other firm engaged in any work covered by this Agreement, the execution of this Agreement shall be deemed applicable to any work covered by this Agreement performed by such other firm to the fullest extent permitted by law [emphasis added] and the execution of this Agreement shall render the signatory personally liable for any violation of this Agreement by such other firm or enterprise.

On October 9, 1995, Linford's attorney sent a letter to the Arbitration Committee in which it advised the Committee that Linford did not intend to appear at the October 12, 1995, hearing because the work in question was being performed by LSC, a separate employer. The Arbitration Committee sustained the grievance and awarded a monetary remedy to Local 38 in the

amount of $24,800 for the members' lost time.

On December 16, 1995, Local 39 threatened to picket and strike if the work in question were assigned to non-Local 39 unit employees. On February 15, 1995, Cases 32-CC-1401 and 32-CE-72 were filed by Linford against Local 38, alleging violations of Sections 8(b)(4)(i)(ii)(A) and (B) and Section 8(e). Case 32-CD-146 was filed by LSC against Local 39.

ACTION

We conclude that the instant cases should be disposed of consistent with the analysis set forth below.

We agree with the Region that: (1) Article 1, Section 2(d) is lawful on its face because of the savings clause "to the fullest extent permitted by law"; (2) this original "entering into" was outside of the Section 10(b) period; (3) there was an unlawful "entering into", within the Section 10(b) period, when the Arbitration Committee sustained Local 38's grievance against Linford[(1)] and this arbitration award is the equivalent of a mid-term modification of the contract, by agreement of the parties, to add an unlawful hot cargo clause;[(2)]

(4) Article 1, Section 2(d) does not fall within the construction industry proviso;[(3)] and (5) Local 38's grievance filing conduct was (ii) restraint or coercion under Section 8(b)(4) of the Act.[(4)]

We further conclude that the Region should allege that Local 38 violated Section 8(b)(4)(i)(ii)(A) of the Act in order to compel Local 38 to cease and desist from forcing Linford to enter into an agreement, i.e. the unlawful interpretation of Article 1, Section 2(d) of the contract, prohibited by Section 8(e). However, we conclude that the Region should not allege a violation of Section 8(b)(4)(i)(ii)(B) in that such an allegation would not provide a remedy not already obtainable under Section 8(b)(4)(A) and 8(e) of the Act.

Finally, we conclude that the Region should allege that Local 39 violated Section 8(b)(4)(D) of the Act by threatening to strike and picket LSC if work at the Clementina site were assigned to non-Local 39 employees. Section 8(b)(4)(D) prohibits a labor organization from engaging in coercive conduct, with the object of compelling an employer to allocate work to one group of employees rather than another. If there exists reasonable cause to believe this provision has been violated,[(5)] Section l0(k) mandates a hearing to determine to which body of workers the disputed work should be assigned.

The Supreme Court has defined a jurisdictional dispute as "between two or more groups of employees over which is entitled to do certain work for an employer."[(6)] The Board has further delineated the elements that give rise to a jurisdictional dispute. The source of the conflict must be competing claims by employee groups as to which has the right to perform the work in question.[(7)] Conversely, a jurisdictional dispute will not be found if the conflict is between an employer and a single labor organization,[(8)] nor if actions freely taken by an employer have triggered the dispute.[(9)] Similarly, a union will not be deemed to have violated Section 8(b)(4)(D) when the object of its allegedly coercive conduct was to preserve work for employees it represented despite the employer's unilateral decision to reassign the work.[(10)] The Board has held that if the requisite elements of a jurisdictional dispute are present, issuance of a Section 8(b)(4)(D) complaint leading to a Section l0(k) hearing is the appropriate route for determining to which group of employees the work in question should be assigned.

Applying these principles to the facts of the instant case, we find that there is a jurisdictional struggle between rival groups of employees. Local 38 has claimed the work usually performed by Local 39 at the Clementina site and Local 39 has threatened to strike and picket to keep the work. Therefore, we conclude that a Section 8(b)(4)(D) complaint should issue, absent settlement.

The Board's recent decision in Capitol Drilling[(11)] does not require a contrary result. Capitol operated as a concrete sawing and drilling contractor that performed work primarily as a subcontractor on residential, commercial and highway construction projects. E&B was a general contractor that was awarded a construction project and subcontracted the joint control concrete cutting portion of the project to Capitol. Capitol assigned the work to its employees who were represented by the Laborers Union. E&B was signatory to a collective-bargaining agreement with the Operating Engineers. The E&B-Operating Engineers

contract had a clause restricting the subcontracting of work coming within the occupational jurisdiction of the Operating Engineers to those willing to become signatory to the E&B-Operating Engineers contract. After Capitol began performing the joint control cutting for E&B, the Operating Engineers filed a grievance against E&B alleging that E&B improperly subcontracted the control sawing to Capitol in violation of the E&B-Operating Engineers contract. The grievance sought monetary damages and injunctive relief. The Laborers threatened Capitol with picketing if the joint control sawing work were reassigned. The Operating Engineers did not engage in any strike or work stoppage or make any threats with regard to the assignment of the work. The only action taken by the Operating Engineers was the filing of a grievance against E&B alleging breach of the E&B-Operating Engineers contract.

The Board held that there was no jurisdictional dispute as contemplated in Sections 8(b)(4)(D) and 10(k) of the Act, because there were no competing claims to the disputed work between rival groups of employees. The Board further held that, in the construction industry, a union's action through a grievance procedure, arbitration, or judicial process, to enforce an arguably meritorious claim against a general contractor that work has been subcontracted in breach of a lawful union signatory clause, does not constitute a claim to the subcontractor for the work, provided that the union does not seek to enforce its position by engaging in or encouraging strikes, picketing, or boycotts by threatening such actions.[(12)]

Capitol Drilling is distinguishable from the instant case. Capitol Drilling involved the construction industry in which the proviso to Section 8(e) exempts from prohibition agreements between unions and employers relating to the contracting or subcontracting of work done at the jobsite. Thus, if the Board had found a work jurisdictional dispute in Capitol Drilling, it would have defeated the union's efforts to peacefully enforce a proviso-protected subcontracting clause through arbitration. In the instant case, the clause in question is not protected by the construction industry proviso. Thus, it could not be argued here that issuing a Section 8(b)(4)(D) complaint would impede Local 38's efforts to peacefully enforce a lawful proviso-protected clause through arbitration. In addition, regardless of whether Article 1 Section 2(d) is covered by the construction industry proviso, Local 38 did not seek to peacefully enforce an arguably lawful interpretation of a contract provision through the use of grievance/arbitration. Rather, Local 38's enforcement of Article 1, Section 2(d) constituted unlawful (ii) restraint and coercion since it sought to enforce a clearly unlawful interpretation of this facially lawful clause.[(13)] Thus, issuing a Section 8(b)(4)(D) complaint in this case would not be contrary to the Board's policy, articulated in Capitol Drilling, of fostering the lawful use of the arbitral process. Therefore, Capitol Drilling is distinguishable. Accordingly, a Section 8(b)(4)(D) complaint should issue against Local 39, absent settlement.[(14)]

B.J.K.

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[1] Los Angeles County District Council of Carpenters (Coast Construction Co., Inc.), 242 NLRB 801, 804 (1979), enfd. 709 F.2d 532 (9th Cir. 1983); Retail Clerks Union, Local 770 (Hughes Markets, Inc.), 218 NLRB 680, 683 n. 11 (1975); Boilermakers, Local 92 (Bigge Drayage Co.), 197 NLRB 281, 288 (1972). In such circumstances, the arbitral award is repugnant to the Act and cannot be deferred to under Spielberg Manufacturing Co., 112 NLRB 1080 (1955). See, e.g., Retail Clerks Union Local 324 (Ralph's Grocery Company), 235 NLRB 711, 713 (1978).

[2] See United Mine Workers of America (Westmoreland Coal Company), 117 NLRB 1072, 1075 (1957); Hughes Market, supra (arbitration award which "by virtue of Article XIVc4 of the contract is binding on both parties, amounts to a 're-entering into' of the contract...").

[3] Northeast Ohio District Council of Carpenters (Ernest Alessio Construction Company, Inc.), 310 NLRB 1023 (1993).

[4] Long Elevator, 289 NLRB 1095 (1988).

[5] Sheetmetal Workers, Local 9 (Elward, Inc.), 250 NLRB 724, 727 n.2 (l980) (the Board need not resolve conflicts in testimony to find reasonable cause that Section 8(b)(4)(D) has been violated).

[6] NLRB v. Radio & TV Engineers, Local l2l2 (CBS), 364 U.S. 573, 579 (l96l).

[7] Local 839, Teamsters (Shurtleff & Andrews Constructors), 249 NLRB l76, l77 (l980), enfd. 695 F.2d 424 (D.C. Cir. l982).

[8] Local 578, Teamsters, (USCP-Wesco, Inc.), 280 NLRB 818, 820-821 (1986).

[9] Local l07, Teamsters (Safeway Stores, Inc.), l34 NLRB l320, l323 (l96l).

[10] Local 8, Longshoremen's and Warehousemen's Union (Waterway Terminals Co.), l85 NLRB l86, l88 (l970), revd. on other grounds, 467 F.2d l0ll (9th Cir. l972).

[11] 318 NLRB No. 100 (1995).

[12] Id. at slip op. p. 2.

[13] Long Elevator, above.

[14] The issuance of a Section 8(b)(4)(D) complaint in this case against Local 39 is not redundant in that the Section 8(e) and 8(b)(4)(B) allegations are against Local 38, not Local 39. Thus, the Section 8(b)(4)(D) complaint would provide a means, not otherwise available in these cases, of preventing Local 39 from threatening LSC with a strike and picketing.